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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

In re KLUDIP S. KLER, on Habeas Corpus.	A121800 (Alameda County Super. Ct. No. CH-9135)

In 1989, petitioner Kuldip S. Kler was convicted of the second degree murder of his daughter, Simron, and sentenced to an indeterminate term of 15 years to life in prison. The Board of Parole Hearings (Board) denied parole for the fifth time on June 22, 2007, and set the next parole hearing in two years. Petitioner sought a writ of habeas corpus from the Alameda County Superior Court, which denied his petition. After he filed a petition for such a writ in this court, we issued an order to show cause. Concluding that the Board's decision to deny parole is not supported by "some evidence," we now grant the petition and issue the writ. (*In re Lawrence (*2008) 44 Cal.4th 1181, 1190-1191 (*Lawrence*).)

BACKGROUND

1. The Commitment Offense and Trial

In the early morning hours of February 25, 1987, 10-month-old Simron Kler died from injuries sustained while she was at home alone with petitioner, her father. Simron's mother, Rupinder Kler, petitioner's wife, was at work that morning until called home by petitioner. Shortly thereafter, police and fire department personnel were dispatched to the apartment. As discussed in our opinion affirming the judgment convicting petitioner,

"[f]irefighters responding to a 911 call from the aunt at 4:33 a.m. found Simron was not breathing and began CPR. She was bruised on her torso and had abrasions on her face and mouth." (*People v. Kler* (Jan. 29, 1991, A046790) [nonpub. opn.], p. 2.) An ambulance was called and paramedics observed Simron to be "bruised from head to foot, blue, cool and unresponsive. They rushed her to a hospital emergency room, where she was similarly observed and pronounced dead on arrival at 5:08 a.m." (*Id.* at p. 3.)

An autopsy revealed that "Simron died of blunt force trauma, having suffered 110 bruises and scrapes over her arms, legs, torso, neck and body. Internal injuries included eight broken ribs, liver, intestinal, lung and chest cavity bruising, and lacerations of the duodenum and small bowel mesentery." (*People v. Kler, supra*, A046790, at p. 3.) In denying parole, the Board stated that "the beating of Simron Kler was so extensive and thorough that she had in her vaginal area, blood coming from that area, which is indicative of literally the internal organs being pulverized."

Petitioner's defense was that he inflicted the fatal injuries while unconscious during an epileptic seizure. Yet, when his sister-in-law arrived that night, petitioner told her that "he was feeding the child when she started gagging." (*People v. Kler, supra*, A046790, at p. 3.) Petitioner explained to a responding officer and to the child's pediatrician that "[t]he child awoke crying at 3:15 a.m.; he took her from her crib, brought her into the living room, got a bottle and began feeding her; and part way through the feeding she began breathing heavily and vomiting." (*Ibid*.)

Petitioner's wife informed the police that she had observed prior bruising on the child. She "told a police detective that she had noticed bruises on Simron before which concerned her, that defendant admitted slapping Simron when she cried and would not sleep." (*People v. Kler, supra*, A046790, at p. 3.) Later the wife "saw bruises on Simron again, while bathing her the week before the death, and that when she accused him of further hitting, [petitioner] said the child had fallen down." (*Ibid.*) Tellingly, the autopsy "revealed older rib fractures that had occurred on two to four different occasions." (*Ibid*.)

At trial, petitioner presented a not-guilty-by-reason-of-insanity defense, claiming he had a grand mal seizure while feeding Simron, blacked out, "and then 'recovered' to find them both on the floor." (*People v. Kler, supra*, A046790, at p. 4.) He theorized that Simron struck her head on a coffee table. (*Ibid*.) Rejecting this defense, the jury convicted petitioner of second degree murder with a finding that he intentionally inflicted great bodily injury and, in the sanity phase, found him legally sane. (*Id.* at p. 1.) Before this conviction, petitioner had no prior arrests and no criminal history.

2. The 2007 Board Hearing

At the June 22, 2007 parole hearing, petitioner acknowledged, as he has since the 1997 parole hearing, that he killed Simron. He explained that he was taking care of his daughter because his wife had to work the night shift. He went to bed around 2:30 or 3:00 in the morning, after completing paperwork for his job as an insurance agent. About half an hour after going to sleep, Simron's crying woke him; he gave her a bottle and put her back in her crib. Fifteen minutes later she again awoke crying; he attempted to quiet her and again put her back in the crib. When Simron woke a third time he started yelling, slapped her, and, when she started crying harder, petitioner said he "lost control" and "started beating her." When asked if he used any weapons, petitioner testified he did not, that he beat her with his fists.

Petitioner reiterated his 1999 acknowledgement that he had hit Simron on days prior to inflicting the injuries that caused her death. At the 2007 hearing, he told the board that he slapped her previously and that "every time I've been told there was the bruises and this, Sir, maybe I did it, but I don't recall." Given the importance it attached to this issue, the Board explored the subject further. After petitioner declared his inability to recall the details of when or how he first inflicted injury on his daughter, the following exchange took place:

> "PRESIDING COMMISSIONER PRIZMICH: So besides the slap, are you saying that there were other injuries that you caused to her?
>
> "INMATE KLER: Yes, Sir.

"PRESIDING COMMISSIONER PRIZMICH: Okay. In terms of imposing discipline on your daughter, was it always with your hands?

"INMATE KLER: Yes, Sir, most of the time. I yell too.

"PRESIDING COMMISSIONER PRIZMICH: Okay. But in terms of injuries, were they always with your hands?

"INMATE KLER: Yes, Sir.

"PRESIDING COMMISSIONER PRIZMICH: And would they be slapping or would they be punching? Do you remember punching her?

"INMATE KLER: Slapping, Sir. Most of the time, it was slapping and on that day, I did punch, Sir.

"PRESIDING COMMISSIONER PRIZMICH: You did close your fist and actually—

"INMATE KLER: Yes, Sir.

"PRESIDING COMMISSIONER PRIZMICH: —punch her?

"INMATE KLER: Yes, Sir."

After again discussing the murder and petitioner's treatment of his wife and his two younger children, the prior beating of Simron was again explored:

"PRESIDING COMMISSIONER PRIZMICH: . . . Now, the injuries that the baby had preceding the murder—

"INMATE KLER: Yes, Sir.

"PRESIDING COMMISSIONER PRIZMICH: —where were those located on the body? Where did you—where did—if you slapped her or hit her, where would you normally do that?

"INMATE KLER: The face, Sir.

"PRESIDING COMMISSIONER PRIZMICH: In the face.

"INMATE KLER: Yes, Sir.

"PRESIDING COMMISSIONER PRIZMICH: Why were you directing your attention to her face?

"INMATE KLER: Well, that was easy to slap her, so, and—

"PRESIDING COMMISSIONER PRIZMICH: Did you hold her in one spot or?

"INMATE KLER: On that night?

"PRESIDING COMMISSIONER PRIZMICH: No, prior to. Well, the—

"INMATE KLER: No, I never hold her.

"PRESIDING COMMISSIONER PRIZMICH: You never held her down?

"INMATE KLER: No.

"PRESIDING COMMISSIONER PRIZMICH: Just on that night you held her down?

"INMATE KLER: Yes, Sir.

"PRESIDING COMMISSIONER PRIZMICH: You were intent on taking punishment out to [*sic*] her?

"INMATE KLER: Yes, Sir.

"PRESIDING COMMISSIONER PRIZMICH: But prior to that, you would slap her in the face?

"INMATE KLER: Yes, Sir.

"PRESIDING COMMISSIONER PRIZMICH: Would they leave marks?

"INMATE KLER: Sure.

"PRESIDING COMMISSIONER PRIZMICH: On her face. But she had—she had marks other places. She had rib injuries and whatnot.

"INMATE KLER: I have—Sir, if I can tell the truth, everything, I never did. I have no idea how they came before. Like you said, the prior, I have no idea, Sir.

"PRESIDING COMMISSIONER PRIZMICH: Do you believe you did that or do you believe that somebody else did it or they didn't occur?

"INMATE KLER: I don't believe anybody else did it. I believe I did it, Sir, but I don't recall. I don't—because she never cried. She went to other people's house, my in-laws family house. It's a big family, Sir. [¶] So otherwise if she has broken ribs or something, I could hide it, but other person must notice that. The baby's crying too much. We need to take her to the doctor or something. But nobody ever noticed this.

"PRESIDING COMMISSIONER PRIZMICH: So let me just get that part straight. Are you saying that you don't believe the injuries were there because no one else noticed her crying? Is that what I'm—

"INMATE KLER: No. No, I'm just saying, Sir, I'm saying the injury must be there. I'm not going against the coroner report.

"PRESIDING COMMISSIONER PRIZMICH: Yeah.

"INMATE KLER: I'm saying, but I don't remember.

"PRESIDING COMMISSIONER PRIZMICH: You don't remember the incidents.

"INMATE KLER: Yes.

"PRESIDING COMMISSIONER PRIZMICH: Okay. But in terms of disciplining her on the days pervious, would your—would your focus of the attention of discipline when you slapped her, would it always be in the face or would it be, would you punch her at any time or shake her in anyway?

"INMATE KLER: Sir, I never shake any time."

In discussing the commitment offense, petitioner explained the circumstances leading to Simron's death: He had recently immigrated to the United States from his native India "with a dream that I would be very successful" and was single-minded towards that end, to the point that he worked day and night for nine months straight. Given that he had also recently married and had a child, he was also under considerable stress. Because of this drive and stress, "whenever [the] baby cried, it irritated" him. He

explained that his drive for success, the stress he was under at work and at home, and the irritation all contributed to losing control and inflicting mortal injuries on his daughter, which occurred shortly after 2:30 or 3:00 a.m. after he had just finished working and gone to sleep.

Much of the remainder of the hearing was spent on petitioner's exemplary prison record. He was twice disciplined: once in 1994 for failing to appear at work during a "generalized strike" when everyone in the prison refused to work and, most recently, in 1998 for "excessive physical contact" with his wife during a visit. Regarding the latter, he immediately admitted the violation and accepted his punishment. On the other side of the ledger, petitioner has excelled in religious studies and counseling. Although there are no Sikh programs (his own religion), petitioner has immersed himself in religious training, having participated in almost 40 religion and bible studies classes during his incarceration. He has also competed an impressive amount of self-help and counseling. For instance, according to the 2007 Mental Health Evaluation, in the two years between his 2005 and 2007 hearings, petitioner completed at least 75 Correctional Learning Network programs. Other self-help and counseling includes "special programs such as Success on the Job, Dispute Resolution, Anger Control, Victim Awareness, Anger Reducers, Anger Management, Know Thyself, Healthy Family slash Kids, Stress Management, Business Basics, Communications and Five Secrets to Finding a Job." In addition to parenting classes, activities that the Board acknowledged included "Healing of Men and Motivation Development Group. Other self-help classes include Return No More, Focus Driven Life Sessions, Love, Respect, The Way to Happiness, Extraordinary Living, Motivation Through Discussing Problems, Ethics and Learning Improvement."

Petitioner also received commendations for his excellent ceramics work, which he donates for sale to benefit various charities. His pottery and other handiwork has been donated to the 2000, 2002, and 2003 Annual Art Sales and the San Joaquin County Child Abuse Prevention Council, where his gifts were was auctioned and helped to raise $16,000 for that charity.

The Board also noted the numerous job training programs in which petitioner has participated. Although he has an undergraduate degree and masters in political science from Punjab University, he has completed a considerable amount of job training while in prison. He was trained in janitorial and auto body work, and also completed 1,800 hours of auto mechanics training, though certification required only 1,200 hours.

Also discussed at the hearing were petitioner's promising parole plans and numerous job offers. He received job offers in Roseville (where his wife lives), El Monte (where his brother lives), and in Alameda County (the county of commitment). Due to an Immigration and Naturalization Service (INS) hold and possible deportation, petitioner also had parole plans—including a job offer—in India. He indicated that if he was not to be paroled to Roseville, his wife and family would relocate with him.

Numerous letters of support were submitted to the Board, including one from petitioner's wife. Noting that it was a "very supportive letter," the Board read into the record a portion in which she expressed the belief that without petitioner's love she "could not have made it in life" and that his "wisdom not only guided me into being a successful mother in understanding life, but allowed me to reach ultimate happiness."

The evaluations and psychological reports before the Board were also supportive. The 2003 Life Prisoner Evaluation Report states that in 1997 petitioner "admitted guilt to the instant offense and expressed remorse for his actions," and in 1999 he explicitly acknowledged that he had abused Simron on more than one occasion. The report concluded with the following recommendation:

> "This writer believes the prisoner would probably pose a low degree of threat outside an institutional setting, considering the commitment offense, prior record, prison adjustment and Staff Psychologist Dr. Roger Kotila's, Mental Health Evaluation of 7-14-99, in which he states in part, ' . . . this man would be a good candidate for parole. The likelihood of his committing future violence is low.' 'From a psychiatric view point, he is a good candidate for parole with low risk of future violence, and a high probability that he will be a law abiding citizen.' He

also has a strong support system of family and friends, which give him an excellent chance of success."[1]

The psychological reports all also found that petitioner presented a below-average risk for reoffending. For instance, in the 1999 Mental Health Evaluation, the psychologist concluded that "[t]he likelihood of [petitioner] committing future violence is very low" and that "[f]rom a psychiatric view point, he is a good candidate for parole with low risk of future violence, and high probability that he will be a law-abiding citizen." That positive conclusion is echoed in the most recent Mental Health Evaluation, prepared in June 2007. That report recognizes that "[a]ll factors that have been identified in the research as positive indicators of success on parole are present in Mr. Kler's case," and concludes that the "[a]ssessment of dangerousness if released into the community is seen as below average in comparison with other inmates."

3. 2007 Board Decision

After considering the evidence, the Board found that petitioner's release "would pose an unreasonable risk of danger to society or a threat to public safety." The factors relied upon by the Board were the cruel manner of the crime, that the offense was "carried out dispassionately," an escalating pattern of behavior (as exhibited by the prior beatings of Simron), and callous disregard for human suffering. The Board also found it "noteworthy" that petitioner "only recently acknowledged the crime itself" and "has only in part and only very recently started talking about preexisting injuries that the child had and even today, doesn't recall some substantial rib injuries that were preexisting." The Board also found it "noteworthy" that petitioner "only acknowledge[d] that he slapped her once prior to the death." This led the Board to believe that "acceptance of total responsibility is only now starting to come out with Mr. Kler."

[1] Apparently the format of the Life Prisoner Evaluation Reports changed, as the two subsequent ones, dated 2005 and 2007, do not contain a recommendation to the Board regarding whether or not petitioner should be paroled.

Finally, the Board "note[d] that [it found that] the letters from Mr. Kler's wife had some particularly disturbing information in them;" namely, that "she seems to be deeply in love or committed to her husband [and] stuck up completely and totally for him." Because of her level of devotion to her husband, the Board concluded that "[s]he seems to be a troubled woman with regard to commitment of love in this case." Given this "over the top" family support, the Board was not sure whether petitioner's wife and other family members would "stand up to" petitioner "if he were to be going down the wrong road."

The Board did acknowledge petitioner's "enormous amount of self-help" and saw "that corner being turned now on his part." In a separate decision pertaining to the timing of the next parole hearing, based on the same factors cited in denying parole, the Board found that "it is not reasonable to expect that parole would be granted during . . . the next two years."

DISCUSSION

Judicial review of the Board's parole decisions is circumscribed. "As long as the [Board's] decision reflects due consideration of the specified factors as applied to the individual prisoner in accordance with applicable legal standards, the court's review is limited to ascertaining whether there is some evidence in the record that supports the [Board's] decision." (*In re Rosenkrantz* (2002) 29 Cal.4th 616, 677.) Deference to the Board, however, does not mean that courts are simply rubber stamps; the "standard is unquestionably deferential, but certainly is not toothless." (*Lawrence, supra,* 44 Cal.4th at p. 1210.) "Rather, the reference in *Rosenkrantz* to some evidence to support the Board's decision to deny parole means its ultimate decision that the inmate poses a current risk of danger to society if released from prison." (*In re Palermo* (2009) 171 Cal.App.4th 1096, 1107, citing *Lawrence, supra,* 44 Cal.4th at pp. 1210, 1212.)

Because Penal Code section 3041, subdivision (a), provides "that the Board *shall normally* set a parole release date . . . , a reviewing court's inquiry must extend beyond searching the record for some evidence that the commitment offense was particularly

egregious and for a mere *acknowledgement* by the Board or the Governor that evidence favoring suitability exists. Instead, under the statute and the governing regulations, the circumstances of the commitment offense (or any of the other factors related to unsuitability) establish unsuitability if, and only if, those circumstances are probative to the determination that a prisoner remains a danger to the public. It is not the existence or nonexistence of suitability or unsuitability factors that forms the crux of the parole decision; the significant circumstance is how those factors interrelate to support a conclusion of current dangerousness to the public." (*Lawrence, supra,* 44 Cal.4th at p. 1212.) There must be something "more than rote recitation of the relevant factors with no reasoning establishing a rational nexus between those factors and the necessary basis for the ultimate decision—the determination of current dangerousness. 'It is well established that a policy of rejecting parole solely upon the basis of the type of offense, without individualized treatment and due consideration, deprives an inmate of due process of law.' [Citation.]" (*Id.* at p. 1210.)

This "individualized treatment" requires more than merely denying parole based on immutable factors, such as the commitment offense. "[T]he statutory and regulatory mandate to normally grant parole to life prisoners who have committed murder means that, particularly after these prisoners have served their suggested base terms, the underlying circumstances of the commitment offense alone rarely will provide a valid basis for denying parole when there is strong evidence of rehabilitation and no other evidence of current dangerousness." (*Lawrence, supra,* 44 Cal.4th at p. 1211.) Indeed, "the aggravated nature of the crime does not in and of itself provide some evidence of *current* dangerousness to the public unless the record also establishes that something in the prisoner's pre- or post-incarceration history, or his or her current demeanor and mental state, indicates that the implications regarding the prisoner's dangerousness that derive from his or her commission of the commitment offense remain probative to the statutory determination of a continuing threat to public safety." (*Id.* at p. 1214.) "Rather, the relevant inquiry is whether the circumstances of the commitment offense, when

considered in light of other facts in the record, are such that they continue to be predictive of current dangerousness many years after commission of the offense. This inquiry is, by necessity and by statutory mandate, an individualized one, and cannot be undertaken simply by examining the circumstances of the crime in isolation, without consideration of the passage of time or the attendant changes in the inmate's psychological or mental attitude. [Citations.]" **(***Id.* at p. 1221.) Thus, parole may be denied based "upon the circumstances of the offense, or upon other immutable facts such as an inmate's criminal history . . . *only* if those facts support the ultimate conclusion that an inmate *continues* to pose an unreasonable risk to public safety. [Citation.] Accordingly, the relevant inquiry for a reviewing court is not merely whether an inmate's crime was especially callous, or shockingly vicious or lethal, but whether the identified facts are *probative* to the central issue of *current* dangerousness when considered in light of the full record before the Board or the Governor." (*Ibid*.)

In *In re Shaputis* (2008) 44 Cal.4th 1241, the companion case to *Lawrence*, the Supreme Court indicated when immutable factors such as the circumstances of the offense properly figure into the decision to deny parole. The court affirmed the parole denial in *Shaputis* based on the facts of the commitment offense where the inmate failed "to gain insight into his antisocial behavior despite years of therapy and rehabilitative 'programming.' " (*Id*. at p. 1260.) There, three factors illustrated the continued relevance of the facts of the commitment offense: (1) killing his wife "was the culmination of many years of . . . violent and brutal behavior toward the victim, his children, and his previous wife," (2) continued protestation that the gun fired accidently when the forensic evidence showed that was impossible, and (3) negative psychological reports that concluded that his history of domestic violence "remain[ed] unchanged." (*Id.* at pp. 1259, 1248, 1260.) From this, the Court distinguished the facts in *Shaputis* from those in *Lawrence*: "This is not a case, like *Lawrence* . . . , in which the commitment offense was an isolated incident, committed while petitioner was subject to emotional stress that was unusual or unlikely to recur. [Citation.] Instead, the murder was the

culmination of many years of petitioner's violence and brutalizing behavior toward the victim, his children, and his previous wife." (*Shaputis*, at p. 1259.)

In the present case, all of the factors the Board relied upon were immutable.[2] Specifically, the Board denied parole based on the following circumstances: (1) the commitment offense was carried out in an especially cruel manner; (2) the offense was carried out dispassionately; (3) there was an escalating pattern of child abuse; and (4) the offense was carried out in a manner that demonstrate[d] exceptional callous disregard for human suffering. Even assuming these findings are supported by the record,[3] they all pertain to the commitment offense, which cannot be used to deny parole unless it can be shown that they "support the ultimate conclusion that an inmate *continues* to pose an unreasonable risk to public safety." (*Lawrence, supra,* 44 Cal.4th at p. 1221.) Here, the Board did not connect the facts of the commitment offense to a *continued* unreasonable risk of public safety in any respect—and our own review of the record reveals no such connection. Thus, the immutable factors do not provide "some evidence" that petitioner continues to be an unreasonable risk to public safety.

As earlier noted, after denying parole, the Board went on to discuss other factors that it found "noteworthy." It is unclear whether these factors were used by the Board as a basis for denying parole, but they too are unsupported by the record or other relevant considerations. As indicated, the "noteworthy" factors were: (1) that petitioner "only acknowledge[d] that he slapped [his daughter] once prior to the death"—leading the Board to conclude that "acceptance of total responsibility is only now starting to come

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[2] In the most strict sense, the factors actually cited in support of the decision to deny parole were solely limited to the facts of commitment offense. But, after announcing its decision, the Board also discussed two factors that they found "noteworthy." The factors cited in denying parole and the "noteworthy" factors will be analyzed separately.

[3] At a minimum, the second factor cited by the Board, that the crime was carried out dispassionately, appears to be inapplicable as the record indicates the crime was caused by an uncontrolled emotional outburst while under stress: i.e., a "crime of passion."

out"; and (2) that the letters submitted indicating family support were "disturbing" and "over the top," which lead the Board to conclude that petitioner's wife "seems to be a troubled woman" who might not "stand up to" petitioner.

The first factor, that petitioner allegedly only acknowledged one prior slapping, is belied by the record, which shows exactly the opposite. Petitioner repeatedly acknowledged that he abused Simron multiple times before he killed her. For example, in response to the question asking whether his discipline of Simron included punching, petitioner said, "Slapping, Sir. *Most of the time,* it was slapping . . . ." (Italics added.) Later the following exchange took place:

> "PRESIDING COMMISSIONER PRIZMICH: But prior to that, you would slap her in the face?
>
> "INMATE KLER: Yes, Sir.
>
> "PRESIDING COMMISSIONER PRIZMICH: Would they leave marks?
>
> "INMATE KLER: Sure."

These exchanges clearly contemplate multiple occasions and multiple slaps. In short, the conclusion that petitioner only now acknowledged one prior slapping is not supported by the record.

The Board's conclusion that petitioner's "acceptance of total responsibility is only now starting to come out" is similarly unsupported by the record. For almost 10 years, petitioner has consistently admitted and accepted responsibility for his prior abuse of Simron. For example, the 2003 Life Prisoner Evaluation Report states that in 1999 petitioner "concede[d] that he abused the child on more occasion[s] than he initially admitted." (*Ibid*.) The record provides no evidence that petitioner's acknowledgement of responsibility is still evolving, changing, or begrudging. The record reveals no evidence showing petitioner's acceptance of responsibility has materially changed since 1999, almost 10 years before the hearing in question. Thus, this Board conclusion is not supported "some evidence."

It is true that petitioner testified before the Board that prior to the morning in

question he only remembers having slapped Simron. Yet he specifically accepted full responsibility for causing Simron's pre-existing broken ribs, which he acknowledged could not have been caused by mere slapping. Petitioner's inability to remember exactly how he previously injured his daughter is thus relatively insignificant.

Moreover, denying petitioner parole because he did not remember prior instances of hitting his child, but only slapping her (while accepting that, in view of her serious prior injuries she had been hit and only he could have been responsible) places petitioner in an impossible situation. If, taking the cue from the Board, he stated that he now remembered hitting the child, the Board could deny parole on the ground that petitioner's acceptance of responsibility was recent, still evolving, and incomplete. The process of determining whether to grant or deny parole does not permit placing an inmate in such a catch-22. Decisions must be made on the basis of the evidence presented and, as we have said, the uncontradicted evidence shows that, whether or not he *remembered* the nature of the beatings that took place before the morning of his daughter's death (i.e., whether it consisted of slapping or hitting), petitioner has long accepted personal responsibility for the *commission* of the prior beatings that resulted in her preexisting broken ribs. Under the facts here, the failure to remember specific prior acts does not suggest a failure to accept full responsibility.

Nor did petitioner accept responsibility begrudgingly. He openly acknowledged the prior abuse and that he was the sole perpetrator. Nor did he try to minimize or deflect his personal responsibility. Petitioner's acceptance of such responsibility was noted by all the prison or mental health evaluators whose psychological reports uniformly concluded that petitioner is an excellent candidate for parole.

We find the second "noteworthy" factor—that petitioner's family support is troubling—even more inexplicable. It is difficult to understand how the loving support of petitioner's wife or other members of his family renders him an unreasonable risk to public safety. It cannot reasonably be inferred from his wife's letter that she would encourage or indulge assaultive or other criminal conduct on his part. The psychological

reports and staff evaluations of petitioner provide no basis upon which to conclude that petitioner will reoffend, nor does anything else in the record. Whether petitioner's wife's expression of deep love for him suggests she may be unable to "stand up to him"—and therefore he presents an unreasonable risk to public safety—is speculative in the extreme. The most reasonable inference to be drawn from the wife's letter is not that she would not "stand up to him" in the event he threatened violence (the likelihood of which is shown neither by the letter nor any other evidence in the record), but that she and petitioner continue to have a stable relationship, which is a factor that tends to show he is suitable for parole. (Cal. Code Regs., tit. 15, § 2281, subd. (d)(2).)

The Board's unjustified reliance on the letter from petitioner's wife to show his unsuitability for parole is made even more remarkable by the Board's inexplicable indifference to undisputed evidence petitioner was under significant stress at the time he committed his crime. As earlier noted, petitioner had recently immigrated to this country, married, and had a child, and had been working "day and night for nine months straight." The fact that an inmate's offense was committed "as the result of significant stress in his life"—which is most likely in cases such as this, in which the prisoner has no prior criminal history—is a factor tending to show suitability for parole. (Cal. Code Regs, tit. 15, § 2281, subd. (d)(4).)

The Supreme Court's distinction between the facts in *Shaputis* and those in *Lawrence* is highly instructive. As in *Lawrence*, petitioner's offense was an isolated crime that was committed under extreme stress, and unlikely to reoccur. It is certainly not analogous to *Shaputis*, where "the murder was the culmination of many years of petitioner's violence and brutalizing behavior toward the victim, his children, and his previous wife." (*Shaputis, supra,* 44 Cal.4th at p. 1259.) Further petitioner's prison behavior and or psychological record is not at all at all analogous to that of Shaputis. Nor can it be said here, as it was of Shaputis, that petitioner's "character remains unchanged and he is unable to gain insight into his antisocial behavior despite years of therapy and rehabilitative 'programming.' " (*Id.* at p. 1260.)

The Attorney General's reliance on the recent opinion in *In re Lazor* (2009) 172 Cal.App.4th 1185, is as difficult to fathom as his reliance on *Shaputis*. At oral argument, the Attorney General seemed to suggest that petitioner's inability to recall the precise manner in which he previously injured his daughter demonstrates the same "lack of insight" discussed by the *Lazor* court. Putting aside the fact that the Board never stated that petitioner lacked personal insight,[4] the facts of this case bear little similarity to those of *Lazor*. In that case, the evaluating psychologist "stated that [Lazor's] thinking patterns indicated a paranoid orientation toward the world and [he] had portrayed himself as the victim and had difficulty accepting responsibility for his role in his problems. According to the psychologist, [Lazor] had an explanation for everything and refused to accept any responsibility for his disciplinary problems. As to the commitment offense, [Lazor] had denied shooting the victim in the back. The psychologist found it difficult to assess the extent to which [Lazor] had explored the commitment offense and come to terms with its underlying causes because [his] version of the crime was so different from the district attorney's and [Lazor] continued to maintain that he acted in self-defense and did not commit a crime." (*Id*. at p. 1194, fns. omitted.) The district attorney also believed Lazor's "claim of self-defense to be inconsistent with having shot the victim in the back a number of times and believed [he] lacked insight into the crime." (*Ibid*.)

The facts of the present case are completely different. For more than a decade, petitioner has neither justified nor sought to minimize his criminal conduct but has fully accepted his sole responsibility for the death of his daughter, for which he has also long expressed profound remorse. Because it is unsupported by any evidence, "lack of

[4] Nor was the petitioner in *Lazor* denied a parole date due to his "lack of insight." Lazor was found unsuitable for release by the Board on the grounds that his commitment offense was carried out in a cruel and callous manner and he had numerous disciplinary violations while in prison. Furthermore, the *Lazor* court did not validate the Board's denial of parole. Due to its primary reliance on the commitment offense, the court directed the Board to reconsider Lazor's parole suitability in light of *Lawrence, supra*, 44 Cal.4th 1181. (*Lazor, supra*, 172 Cal.App.4th at p. 1204.)

insight" would not justify denial of petitioner's application for parole even if, as is not the case, the Board had denied him a parole date for that reason.

In conclusion, the only factors supported by the record that the Board relied on in denying parole are immutable ones: the circumstances of the commitment offense. As we have said, since 1997 petitioner has accepted full responsibility for his crime, and since 1999 has acknowledged his prior abuse of his daughter. He has been a model prisoner in almost every regard and enjoys strong family and community support. Importantly, the psychological evaluations are all very positive, indicating a low risk of recidivism. Indeed, the reports conclude that "[t]he likelihood of [petitioner] committing future violence is very low" and that, "[f]rom a psychiatric view point, he is a good candidate for parole with low risk of future violence, and high probability that he will be a law-abiding citizen." In short, there is no evidence whatsoever supporting the conclusion that petitioner "*continues* to pose an unreasonable risk to public safety" (*Lawrence, supra,* 44 Cal.4th at p. 1221) and is therefore unsuitable for parole.

On the contrary, except for the fact that petitioner was not suffering battered woman syndrome at the time he committed his offense, the evidence indisputably shows the presence of all of the factors indentified in the regulations as tending to show an inmate suitable for release on parole. That is, the record establishes that petitioner has no juvenile record, he has "experienced reasonably stable relationships with others," he has shown signs of remorse, he committed his crime as a result of significant stress in his life, he has no "significant history" of violent crime (indeed, no prior criminal history at all), his "present age reduces the probability of recidivism," he has made "realistic plans for release" and "has developed marketable skills that can be put to use upon release," and his "[i]nstitutional activities indicate an enhanced ability to function within the law upon release." (Cal. Code Regs, tit. 15, § 2281, subd. (c)(1)-(9).) Additionally, there is no evidence showing any regulatory factor tending to show petitioner is unsuitable for

parole.[5]

DISPOSITION

The petition for writ of habeas corpus is granted.

Given that there is no evidence in the record that petitioner currently presents an unreasonable risk to public safety, the Board is directed to find petitioner suitable for parole unless, within 30 days of the finality of this decision, the Board holds a hearing and determines that *new evidence* of petitioner's conduct in prison subsequent to his 2007 parole hearing supports a determination that he currently poses an unreasonable risk of a danger to society if released on parole. (*In re Gaul* (2009) 170 Cal.App.4th 20, 39-41.) In the interests of justice and to prevent frustration of the relief granted, this decision shall be final as to this court five days after it is filed. (Cal. Rules of Court, rule 8.490(b)(3); *In re Aguilar* (2008) 168 Cal.App.4th 1479, 1492.)

_____
Kline, P.J.

We concur:

_____
Lambden, J.

_____
Richman, J.

[5] That is, petitioner's commitment offense was not carried out in an "especially heinous, atrocious or cruel manner"; he has no "[p]revious [r]ecord of violence"; he has no "history of unstable or tumultuous relationships with others"; he has never committed any "[s]adistic [s]exual offenses"; he has no "lengthy history [or any history] of severe mental problems related to the offense"; and he has never "engaged in serious misconduct in prison or jail." (Cal. Code Regs, tit 15, § 2281, subd. (c)(1)-(6).)